(3)

FILED
MAY 29 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1377

In The
Supreme Court of the United States

CHAGANTI & ASSOCIATES, P.C.,

Petitioner,

v.

THOMAS NOWOTNY AND ROGER VARDELEON,

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

Reply Brief for the Petitioner

NAREN CHAGANTI
(*Counsel of Record*)
Law Offices of Naren Chaganti
713 The Hamptons Lane,
Town & Country, MO 63017
naren@chaganti.com E-mail
(650) 248-7011

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY BRIEF OF PETITIONER 1

I. Missouri antitrust law relies on federal antitrust jurisprudence, which makes a generic claim for "unlawful restraint of trade" removable unless it is expressly limited to state law remedies. 1

II. *Grable* clarified *Merrell Dow* as being consistent with *Smith* 1

III. There is a substantial conflict in the courts below on the question of removability. 5

IV. Respondents misunderstand the "artful pleading" doctrine 5

V. Respondents misconstrue *Salve Regina College* 7

VI. CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Albrecht v. *Herald Co.*, 390 U.S. 145 (1968).....1
American Well Works Co. v. Layne & Bowler Co., 241 U.S. 257 (1916).....2, 4
Ames v. *Kansas*, 111 U.S. 449, 462 (1884).....3
Cohens v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821)....3
Grable & Sons Metal Prods., Inc. v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005) 2, 4, 5, 7
Hopkins v. *Walker*, 244 U.S. 486, 489 (1917).....3
Kircher v. *Putnam Funds Trust*, 547 U.S. __ (2006) 5
Martin v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816).....3
Merrell Dow Pharmaceuticals, Inc. v. *Thompson*, 478 U.S. 804 (1986).....1, 2, 4
Osborn v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824).....2, 3
Salve Regina College v. *Russell*, 499 U.S. 225, 233 (1991)7
Shoshone Mining Co. v. *Rutter*, 177 U.S. 505, 508 (1900).3
Shulthis v. *McDougal*, 225 U.S. 561 (1912) 3
Smith v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921).....2, 4
State Oil Co. v. *Kahn*, 522 U.S. 3 (1997).....1
United States v. *Planter's Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 905 (1824).....3

Statutes

28 U.S.C. § 1331 3
28 U.S.C. § 1447(d).....5
Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470 (1875).....3
Mo. Rev. Stat. § 416.141 1

Rules

Fed. R. Civ. P. 52.....7

REPLY BRIEF OF PETITIONER

I. Missouri antitrust law relies on federal antitrust jurisprudence, which makes a generic claim for "unlawful restraint of trade" removable unless it is expressly limited to state law remedies.

Respondents ignore the dependence of Missouri laws on federal jurisprudence and state that federal law is not implicated in a generic antitrust claim filed in Missouri. They overlook the key provision, Mo. Rev. Stat. § 416.141, which states Missouri antitrust laws "shall be construed in harmony with ruling judicial interpretations of comparable federal antitrust statutes." Because Missouri (and many other states) follow the federal antitrust laws, a claim or defense recognized by "the ruling judicial interpretations of comparable federal antitrust statutes" is adopted by Missouri. This means that when, for example, this Court overruled *Albrecht* v. *Herald Co.*, 390 U.S. 145 (1968) in *State Oil Co.* v. *Kahn*, 522 U.S. 3 (1997) and held that vertical maximum price fixing is not a *per se* violation of the Sherman Act, Missouri courts are required to follow this Court's jurisprudence on that issue. When a state court complaint does not limit itself to state law remedies, there is implicit a "substantial federal question" when a generic "unlawful restraint of trade" claim is filed in Missouri.

II. *Grable* clarified *Merrell Dow* as being consistent with *Smith*

On removing a case for a "substantial federal question," Respondents rely on a wrong case, *Merrell Dow Pharmaceuticals, Inc.* v. *Thompson*, 478 U.S. 804 (1986), and argue that the door to remove a case based on a "substantial federal question" is shut by *Merrell Dow*, but this is a backdoor attempt to resurrect the reasoning of *American Well Works Co. v. Layne & Bowler Co.*, 241

U.S. 257 (1916), which is rejected in *Grable & Sons Metal Prods., Inc.* v. *Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

In *American Well Works*, Justice Holmes, writing for the Court, argued that federal jurisdiction should be limited to cases in which federal law created the cause of action asserted in the complaint, and should not be extended to cases in which a cause of action created by state law required the resolution of predicate federal questions. But this view was quickly discarded by *Smith* v. *Kansas City Title & Trust Co.*, 255 U.S. 180, 199 (1921), which held that a federal court may exercise jurisdiction over a case when "the title or right set up by the party, may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction." *Id.*, (quoting *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738, 822 (1824)). Justice Holmes was a dissenter in *Smith*.

In *Grable*, this Court resolved the debate between the approach of Justice Holmes in *American Well Works* and that of Justice Day in *Smith* in favor of the latter, stating, "*Merrell Dow*, then, did not toss out, but specifically retained the contextual enquiry that had been *Smith*'s hallmark for 60 years. At the end of *Merrell Dow*, Justice Holmes was still dissenting." Thus, *Grable* clarified that *Merrell Dow* rejected Justice Holmes' approach, which limited the "arising under" federal jurisdiction to cases in which federal law either created the causes of action, or provided a cause of action analogous to a state-law claim as asserted by a plaintiff. Respondents argue otherwise.

Respondents misunderstood *Grable* and argued that the *Merrell Dow* closed the door for "substantial federal question" removal, despite clear holding to the contrary. Indeed, *Grable* did not inaugurate new law, but reaffirmed the long standing view that Congress originally intended to extend original federal jurisdiction to all cases that turn on the construction of a federal statute law or the Constitution.

See Judiciary Act of 1875, ch. 137, § 2, 18 Stat. 470 (1875) (now codified at 28 U.S.C. § 1331). Most early cases interpreting the Act gave the removal statues an expansive meaning consistent with this understanding. See, e.g., *Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 348 (1816)(Story, J.)("the laws, the treaties, and the constitution of the United States would be different in different states, and might, perhaps, never have precisely the same construction, obligation, or efficacy, in any two states."); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264, 379 (1821)(Marshall, C.J.)(stating that a case arises under the Constitution or federal law whenever the "correct decision depends on the construction of either."); *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824) (Marshall, C.J.); *United States* v. *Planter's Bank of Georgia*, 22 U.S. (9 Wheat.) 904, 905 (1824); *Ames* v. *Kansas*, 111 U.S. 449, 462 (1884) (finding federal jurisdiction because "[t]he right set up by the company, and by the directors as well, will be defeated by one construction of these acts and sustained by the opposite construction."); *Hopkins* v. *Walker*, 244 U.S. 486, 489 (1917) (reversing the district court's dismissal of a claim for lack of jurisdiction because "it is plain that a controversy respecting the construction and effect of the [U.S.] mining laws is involved and is sufficiently real and substantial to bring the case within the jurisdiction of the district court."); *cf. Shulthis* v. *McDougal*, 225 U.S. 561 (1912) (finding federal jurisdiction improper because in actions to quiet title, allegations of competing claims are not properly part of the complaint); *Shoshone Mining Co.* v. *Rutter*, 177 U.S. 505, 508 (1900) (federal jurisdiction denied in a mining claim, because "in a given case the right of possession may not involve any question under the Constitution or laws of the United States, but simply a determination of local rules and customs, or state statutes, or even only a mere matter of fact").

Presciently, *Grable* cautions against reading *Merrell Dow* similar to that by Respondents. Recognizing that there exists "some broad language in *Merrell Dow* * * * that could support" a narrow approach to "substantial federal question" jurisdiction, including imposition of a private-right-of-action requirement or similar formal prerequisites, this Court emphasized,

> But an opinion is to be read as a whole, and *Merrell Dow* cannot be read whole as overturning decades of precedent, as it would have done by effectively adopting the Holmes dissent in *Smith* * * *. In the first place, *Merrell Dow* disclaimed the adoption of any bright-line rule, * * *. And as a final indication that [*Merrell Dow*] did not mean to make a federal right of action mandatory, it expressly approved the exercise of jurisdiction sustained in *Smith*, despite the want of any federal cause of action available to *Smith*'s shareholder plaintiff.

Grable, 545 U.S. at 312. *Grable* resolved a circuit split as to whether a private right of action was necessary for a federal statute to form the basis for federal question jurisdiction. Given that *Grable* elevated *Smith* and clarified *Merrell Dow*, Respondents are wrong in narrowly[1] reading *Grable*. Note that even if one adopts the Holmes' approach of *American Well Works*, in this case the state court complaint still raised a substantial federal question because the Missouri antitrust laws track the federal antitrust laws. Because this case was removable as filed in the state court, late removal should have resulted in a remand.

---

[1] Respondents attempt to limit every case cited by Petitioner to its facts, rather than address whether Petitioner's position logically follows from the rulings.

III. There is a substantial conflict in the courts below on the question of removability.

The issues presented by the petition for certiorari raise substantial questions that involve conflicting rulings in the lower courts. Defendants complain of the paucity of decisions from the courts of appeals, but this is a natural consequence of 28 U.S.C. § 1447(d), which states that a decision to remand is not appealable, see *Kircher* v. *Putnam Funds Trust*, 547 U.S. __ (2006), and one has to look at district court rulings for conflicts as Petitioner did.

Given the conflict between the courts below on this matter, the present case presents a good vehicle by which the Court should resolve the conflict, including addressing questions unanswered in *Grable*, such as whether a complaint that did not exclude a federal claim is removable as filed, what is "substantial federal question," and whether a case can be removed when a state law claim turns on an interpretation of the federal law.

IV. Respondents misunderstand the "artful pleading" doctrine.

Petitioner discussed the "well pleaded complaint rule" to reiterate the federal question must be on the face of a well-pled complaint but that the artful pleading exception permits removal if a federal question lay hidden in the state court complaint, (colorfully stated by Respondents as coming out of the "state court closet," Br. in Opp. 13). Artful or not, the thirty day clock does not extend because a defendant is unable to discern a federal question, which is why whether the complaint is amended to add a federal question becomes important. If no amendment is made to add a federal question, then it must have already been there, and if it is hidden, it is by definition "artfully pled."

On the latter point, Respondents dispute whether the case as originally filed contained a federal question and argue that it contained only state law claims until Petitioner

filed a paper in the Circuit Court for the City of St. Louis stating that the action was brought under the laws of the United States. Respondents dispute whether they could have discerned the federal question until it was bared out by Plaintiff and thus they were not at fault in not removing the case to the federal court within the 30-day period required by statute.[2]

Respondents implicitly argue that the state court complaint was in fact artfully pled, but they reject applying the "artful pleading" doctrine, which permits removal of an artfully pled complaint *but only within the 30-day period.* Respondents correctly state that this doctrine was designed to protect a defendant, Br. in Opp. 7, but wrongly imply that this doctrine *excuses* a defendant's *failure* to timely remove. Without legal basis, Respondents argue that a Plaintiff should not be "allowed to plead what appears to all intents and purposes to be a state law claim and then, after thirty days from service have elapsed, announce that the claim was federal all along," Br. in Opp. 7, which position, if accepted, makes a defendant the "master of the complaint." This view of Respondents, that their *subjective* understanding of the state court claim decides the time for removal, has no basis. Respondents want a doctrine that *extends* the 30-day clock until a defendant learned of a hidden federal question, but they cannot find support for such a position. According to the plain language of the removal statute, an unwary defendant waives a right to remove after thirty days of service.

---

[2] A related question presented to this Court is whether a state court complaint, which remained unaltered, could be interpreted by a defendant for a period as only relying on state substantive laws, and later suddenly be interpreted as relying only on federal substantive laws. Respondents continue to do this in their brief in opposition. They do not cite to a single case holding thus but argue that this was a "garden variety" removal. Br. in Opp. 5.

As stated in the Petition, the Eighth Circuit implied that the "artful pleading" doctrine applied only in "complete preemption" cases, Pet. App., at 7a, but this is an erroneous view, for these are two distinct and separate doctrines. "Complete preemption" focuses on the intent of Congress to take over an area of law, whereas an "artfully pled" claim is one that couches a federal claim as a state law claim—intentionally or unwittingly for only facts and not the legal premises for relief are required in a complaint—and has the effect of running out the removal clock on an unwary defendant.

V. Respondents misconstrue *Salve Regina College*

On the question of which standard of review is to be applied when a district court fails to comply with Fed. R. Civ. P. 52, Respondents once again attempt to read this Court's rulings narrowly and argue that the facts of *Salve Regina College* v. *Russell*, 499 U.S. 225, 233 (1991), differed from the facts here, ignoring the admonition in *Grable* that an opinion is "to be read as a whole."

VI. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

S/Naren Chaganti
NAREN CHAGANTI
(*Counsel of Record*)
Law Offices of Naren Chaganti
713 The Hamptons Lane,
Town & Country, MO 63017
naren@chaganti.com E-mail
(650) 248-7011

Counsel for Petitioner